DANIEL BOGDEN
United States Attorney
TIMOTHY S. VASQUEZ
MICHAEL CHU
Assistant United States Attorneys
333 Las Vegas Blvd. South, Suite 5000
Las Vegas, Nevada 89101
Tel: (702) 388-6336
Fax: (702) 388-6020

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

3. HELEN BAGLEY,
4. BRIAN DVORAK,
5. GINGER GUTIERREZ, and
6. JAMES KINNEY,

Defendants.

2:09-CR-00132-RLH-RJJ

STIPULATION TO DESIGNATE CASE COMPLEX AND TO RESCHEDULE TRIAL AND PROCEEDINGS

COMES NOW THE UNITED STATES OF AMERICA, HELEN BAGLEY, BRIAN DVORAK, GINGER GUTIERREZ and JAMES KINNEY, by and through their undersigned attorneys, and stipulate and request that the Court designate this case complex, vacate the current trial setting of November 16, 2009, and enter an order resetting the trial and related proceedings [a proposed Scheduling Order is filed herewith as Appendix I] to accord the defendants a reasonable time to prepare for trial pursuant to Local Rule of Criminal Practice 16-1(a)(1) and 18 U.S.C. §§ 3161(h)(8)(A) and 3161(h)(8)(B). The parties jointly offer the following grounds for this stipulation and request.

1. Local Rule of Criminal Practice 16-1(a)(1) provides that "[a]t any time after arraignment, the Court . . . upon motion by any party, and for good cause shown, may designate a case as complex." Defendants are typically to be brought to trial within seventy days of the filing of the indictment or the defendant's first appearance before the court, whichever occurs later. 18 U.S.C. § 3161(c)(1). However, in enacting the Speedy Trial Act, the drafters recognized that unusual and complex cases would require more than the typical seventy days to bring to trial. A continuance beyond the seventy days is authorized whenever the Court determines that the ends of justice served by such a continuance outweigh the interests of the public and the defendant in a speedy trial. 18 U.S.C. § 3161(h)(8)(A). Subsection 3161(h)(8)(B) identifies some of the factors that may be considered:

> (I) Whether the failure to grant such a continuance in the proceeding would be likely to . . . ***result in a miscarriage of justice.***
>
> (ii) ***Whether the case is so unusual or so complex***, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section. . . .
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or ***would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence***.

18 U.S.C. § 3161(h)(8)(B) (emphasis added).

2. Count One through Count Four of the Superseding Indictment charge all of the defendants with securities fraud and conspiring to commit securities fraud and related securities offenses. More specifically: Count One alleges that the defendants conspired to sell unregistered securities (in violation of 15 U.S.C. § 77e), to make false statements to the SEC (in violation of 15 U.S.C. § 78ff), to desist from filing periodic reports (in violation of 15 U.S.C. § 78m), and to

commit securities fraud (in violation of 15 U.S.C. § 78j), all in violation of 18 U.S.C. § 371; Count Two charges the defendants, aiding and abetting one another and others, committed securities fraud in violation of 15 U.S.C. § 78j; Count Three charges that the defendants conspired to commit securities fraud (as defined in 18 U.S.C. § 1348), in violation of 18 U.S.C. §1349; and Count Four charges that the defendants, aiding and abetting one another, did commit securities fraud in violation of 18 U.S.C. § 1348. Count Five of the Superseding Indictment charges that defendants KINNEY and GUTIERREZ conspired (with JOHN EDWARDS, URBAN CASAVANT and others) to commit money laundering offenses under 18 U.S.C. §§ 1956 (a)(1)(A)(i), 1956 (a)(1)(B)(i) and 1957, all in violation of 18 U.S.C. § 1956 (h). (Count Six additionally charges that CASAVANT committed tax evasion in violation of 26 U.S.C. § 7201.)

3. The alleged frauds and related money laundering offenses described in the Superseding Indictment allegedly arose out of a sophisticated scheme to fraudulently issue and sell hundreds of billions of shares of purportedly unrestricted stock of CMKM Diamonds, Inc. ("CMKM"). The Superseding Indictment further alleges that the defendants collectively defrauded tens of thousands of investors of more than sixty million dollars ($60,000,000) through this scheme.

4. Due to the nature and scope of the scheme, discovery will be voluminous. Further, the events that gave rise to this criminal action have been the subject of administrative and civil enforcement actions by the Securities and Exchange Commission (SEC) as well as civil litigation brought by private parties, and the documents that the government has received from those sources will add to the materials to be produced in discovery in this case. When combined with materials collected by the Internal Revenue Service (IRS) and the Federal Bureau of Investigation (FBI) in the course of the criminal investigation the culminated in this indictment, the government has scanned more than three hundred thousand pages of materials for discovery.

5. Trial is also expected to be uncommonly long and involve an extraordinary number of witnesses and exhibits. Further, while many of the witnesses are local, certain prospective

witnesses will be traveling from other jurisdictions. Securing the appearance of prospective witnesses in this case will require adequate notice.

WHEREFORE, the parties stipulate and request that the Court declare this case complex, vacate the current trial settings, and approve the Scheduling Order proposed by the parties [Appendix I]. The parties further requests that the Court expressly set forth in the record that any continuance or delay pursuant to this stipulation motion outweighs the best interest of the public and the defendants in a speedy trial for the reasons set forth herein and any others determined by the Court.

RESPECTFULLY SUBMITTED this 26th day of October 2009.

DANIEL BOGDEN
United States Attorney

/s/

Timothy S. Vasquez
Michael Chu
Assistant United States Attorneys
District of Nevada
333 Las Vegas Blvd. South, Suite 5000
Las Vegas, Nevada 89101

/s/

Mark S. Dzarnoski
3960 Howard Hughes Parkway, 9th Floor
Las Vegas, Nevada 89169
([3] HELEN BAGLEY)

/s/

John Wesley Hall
1311 S. Broadway
Little Rock, AR 72202
([4] BRIAN DVORAK)

/s/

Chris T. Rasmussen
330 S. Third Street, Suite 1010
Las Vegas, Nevada 89101
([5] GINGER GUTIERREZ)

/s/

Jacqueline Naylor
701 N. Green Valley Pkwy., Suite 200
Henderson, NV 89074
([6] JAMES KINNEY)

DANIEL BOGDEN
United States Attorney
TIMOTHY S. VASQUEZ
MICHAEL CHU
Assistant United States Attorneys
333 Las Vegas Blvd. South, Suite 5000
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PROPOSED SCHEDULING ORDER

COME NOW THE UNITED STATES OF AMERICA, and HELEN BAGLEY, BRIAN DVORAK, GINGER GUTIERREZ and JAMES KINNEY (collectively, the "defendants"), by and through their undersigned attorneys, and submit this Proposed Complex Case Schedule pursuant to LCR 16-1(a)(2)

I. DISCLOSURES/DISCOVERY ISSUES

A. RULE 16 DISCOVERY AND INSPECTION

1. Statements of the Defendant: The UNITED STATES will permit each defendant to inspect and copy any relevant: (1) written or recorded statements made by that defendant, or copies thereof, within the possession, custody or control of the UNITED STATES, the existence of which is known, or by the exercise of due diligence may become known, to

the attorney for the UNITED STATES; (2) the substance of any oral statement(s) which the UNITED STATES intends to offer in evidence at the trial which was made by the defendant (pre-arrest and post-arrest) in response to interrogation by a person then known by the defendant to be a Government agent; and (3) recorded testimony of the defendant before a grand jury which relates to the offense charged (pursuant to Court order under Rule 6(e)).

2. Defendants' Prior Record: Prior to trial, the UNITED STATES will furnish to the defendants such copies of his or her own prior criminal record, if any, as is within the possession, custody, control of the UNITED STATES, the existence of which is known, or by due diligence may become known, to the attorneys for the UNITED STATES.

3. Documents and Tangible Objects: Prior to trial, the UNITED STATES will permit the defendants to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the UNITED STATES, and which are intended for use by the UNITED STATES as evidence in its case-in-chief at trial or were obtained from or belonged to the defendant or are otherwise material to the preparation of the defense.

4. Reports of Examination or Tests: Prior to trial, the UNITED STATES will permit the defendants to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the UNITED STATES, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the UNITED STATES, and which are material to the preparation of the defense or are intended for use by the UNITED STATES as evidence in its case-in-chief.

5. Criminal Histories and Other Background Information of Government Witnesses: Prior to trial, the UNITED STATES will disclose such criminal history and other impeachment information regarding Government witnesses as is material and reasonable.

See United States v. Flores, 540 F.2d 432, 437 (9th Cir. 1976); *Briggs v. Raines*, 652 F.2d 862 (9th Cir. 1981).

B. *BRADY* INFORMATION

Pursuant to the ruling in *Brady v. Maryland*, 373 U.S. 83 (1963) that "suppression by the prosecution of evidence favorable to an accused, upon request violates due process where the evidence is material either to guilt or punishment," the UNITED STATES will disclose before trial any evidence favorable to the defendant which is material to the guilt or innocence of the defendant. Such disclosure is limited to evidence which is known by government counsel or which could become known by the exercise of due diligence.

C. *GIGLIO* DISCOVERY

Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), the UNITED STATES will disclose before trial all promises, inducements, or threats made to a witness to gain cooperation in the investigation or prosecution of the defendant as they relate to the case-at-bar. Such disclosure is limited to such evidence which is known by Government counsel or could become known with the exercise of due diligence.

D. DISCLOSURES BY DEFENDANTS

1. The defendants will disclose prior to trial any books, papers, documents, photographs, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendants and which the defendants intend to introduce as evidence in chief at the trial. *See* Fed.R.Crim.P. 16(b)(l)(A).
2. The defendants will disclose prior to trial any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the

defendant intends to introduce as evidence in chief at trial or which were prepared by a witness whom the defendant intends to call at trial when the results or report relates to that witness' testimony. *See* Fed.R.Crim.P. 16(b)(l)(B).

3. The defendants will provide discovery of alibi witnesses as provided by Rule 12.1 of the Federal Rules of Criminal Procedure and the UNITED STATES shall provide disclosure of rebuttal evidence as provided within the same Rule.

E. *JENCKS* DISCOVERY

The parties will provide discovery of witness statements not otherwise covered in this statement in accordance with the provisions of Title 18, United States Code, Section 3500 *et. seq*. and Rule 26.2 of the Federal Rules of Criminal Procedure. Rough notes and summaries of witness interviews are not discoverable unless otherwise provided for in this statement or where such notes (1) were adopted by the witness, or (2) are a substantially verbatim recital of the witnesses' interview. *SeeUnited States v. Griffin*, 659 F.2d 932 (9th Cir. 1981); *United States v. Bernard*, 625 F.2d 854 (9th Cir. 1980); and *United States v. Cole*, 457 F.2d 1141 (9th Cir.), cert. denied, 409 U.S. 868 (1972)).

F. RULE 404(b) EVIDENCE

Prior to the introduction of evidence which may be considered Rule 404(b) evidence, the proponent of such evidence will provide sufficient notice to the Court and the parties as to allow for an admissibility hearing (outside of the presence of the jury) under Rule 104 of the Federal Rules of Evidence.

G. SCOPE AND LIMITS OF DISCOVERY

The parties are not required or obliged to disclose the following information and materials (unless required by the Constitutional mandate of *Brady* and *Giglio*):

1. A list of witnesses, *see Weatherford v. Bursey*, 495 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *United States v. Sukumolachav*, 610 F.2d 685 (9th Cir. 1980);

2. Oral statements of a witness which includes the oral statement of a defendant, *see United States v. Walk*, 533 F.2d 417 (9th Cir. 1975); *United States v. Hoffman*, 794 F.2d 1429 (9th Cir. 1986);

3. Oral statements of the defendant which were not in response to interrogation, *see United States v. Von Stall*, 726 F.2d 584 (9th Cir. 1984);

4. Evidence or information which is not within the possession of the Federal Government, *see United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985); *United States v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982); *United States v. Sukumolachav*, 610 F.2d 685 (9th Cir. 1980); *United States v. Higginbotham*, 539 F.2d 17 (9th Cir. 1976);

5. Unless otherwise provided above, the UNITED STATES is not obligated to disclose reports, memoranda, or other internal Government documents made by the attorney for the Government or Government agents in connection with the investigation or prosecution of the case, *see* Fed.R.Crim.P. 16(a)(2);

6. Grand Jury recorded proceedings except as provided by Federal Rules of Criminal Procedure Rules 6, 12(i) and 26.2, *see* Fed.R.Crim.P. 16(a)(3);

7. Reports, memoranda, or other internal defense documents made by the defendant, or his/her attorneys or his/her agents in connection with the investigation or defense of the case, *see* Fed.R.Crim.P. 16(b)(2)(A);

8. Subject to the provisions of Title 18, United States Code, Section 3500 *et. seq.* and Rule 26.2 of the Federal Rules of Criminal Procedure (addressed in Section V, above), statements made to the defendant or the defendant's attorney or agent by (a) the defendant, (b) a government or defense witness, or (c) a prospective government or defense witness.

H. CONTINUING DUTY TO DISCLOSE

The parties recognize that the duty to disclose discoverable information continues throughout the prosecution of the case-at-bar.

I. DUE DILIGENCE BY RECIPIENT

The parties agree that it is the responsibility of the recipient to use due diligence in procuring the discovery made available to him/her.

II. EVIDENTIARY PROCEDURES

A. PROFFERS & NOTICE

When a party anticipates offering at trial evidence which is predicated upon a factual condition, the proffering party will provide its opponent such sufficient notice as to allow for a timely motion in limine to the extent possible prior to trial. Sufficient notice is provided when the non-proffering party is informed of (a) the substance of the evidence establishing the factual condition, and (b) the substance of the evidence intended to be proffered at trial. Examples of such types of evidence include, but are not limited to evidence of co-conspiratorial statements prior felony convictions of witnesses, and evidence seized pursuant to a search.

B. RECORDINGS

1. Each party will exercise due diligence in becoming aware of the existence of any tape recorded conversations and transcripts thereof. A party having custody and control of a tape recording and/or transcript will make at least one (1) copy available for review and copying by all opposing parties. A party receiving such a copy of the tape recording and/or transcript agrees to circulate it among the other parties for their inspection and copying.

2. The copy of a tape recording and/or transcript will be produced for discovery as described above in a timely manner so as to enable the parties to meet and resolve audibility and/or accuracy issues. The parties agree to meet and resolve (to the extent possible) any issues concerning audibility and/or accuracy of recordings and accuracy of transcripts sufficiently in advance of trial as to enable appropriate motions *in limine* to be filed as to any unresolved issues.

C. AUTHENTICATION

The parties agree to meet and resolve (to the extent possible) any issues concerning the authentication and/or admissibility of exhibits anticipated to be used in a party's case-in-chief at trial. This meeting will take place sufficiently in advance of trial as to enable the proffering party to call witnesses where stipulations have not been reached.

D. SUPPLEMENTARY DISCOVERY PROCEDURES

Should a party believe that another party has failed to meet the terms of this schedule or believe that this schedule fails to address the disclosure of evidence which it believes to be material such party will first specifically request such disclosure (as specifically, and as narrowly as possible, identifying the information sought, its location if known, and the materiality of such information). If such a specific request is not met to the satisfaction of the requesting party, then the requesting party may move for the Court to order the production of such information. The motion for the production of such information shall specify the materiality of the evidence sought, its location if known, and shall as specifically and as narrowly as possible identify the information sought.

E. TIMING OF DISCOVERY

To the extent possible, the parties hereto have defined the parameters of obligatory

discovery of information. However, all parties recognize that, except in extraordinary circumstances, the Court is best served by the "open" and accelerated disclosure of information beyond that required by law. Litigation is minimized through such "open" and accelerated disclosure by advancing the negotiation process and minimizing the need for arbitration of discovery issues during and in advance of trial. To that end, the parties will endeavor to provide as open disclosure of information as is appropriate in the case-at-bar. Further, the parties agree that except as specifically provided herein, there is no need for the Court to prescribe phases or dates for discovery because discovery is a continuing obligation. That is, unless otherwise provided herein or by rule or statute, the UNITED STATES should disclose material evidence as it is obtained and the defense shall reciprocate by disclosing discoverable materials in a similar fashion.

III. PROPOSED SCHEDULE FOR PRETRIAL PROCEEDINGS AND TRIAL

Proposed trial date: February 2011

Proposed date for filing pretrial motions: September 2010

Proposed date for filing responses to pretrial motions: Fourteen (14) days from the service of the motion.

Proposed date for filing reply briefs: Seven (7) days from the date of service of the response.

The parties additionally request that the Court periodically hold status conferences.

IV. EXCLUSION OF TIME FOR SPEEDY TRIAL PURPOSES

The Court finds that the that in light of the complexity of the case and the voluminous discovery, it is unreasonable to expect the defendants to adequately prepare for trial by the current setting of November 16, 2009. A continuance of the trial is therefore necessary. The trial date proposed by the parties is reasonable and appropriate to afford the defendants adequate time to prepare and all parties sufficient notice to enable them to secure the presence of witnesses.

The Court further finds it would be impossible for the defendants to proceed within the time limits prescribed by the Speedy Trial Act, Title 18, United States Code, Section 3161, and that denial of the requested continuance in this case would likely result in a miscarriage of justice.

The Court further finds that the ends of justice served by continuing the trial outweigh the best interests of the public and the defendant in a speedy trial.

The period of delay resulting from this continuance shall therefore be excluded pursuant to 18 U.S.C. § 3161(h)(7) in computing the time within the trial in this case must commence under the Speedy Trial Act.

IT IS THEREFORE ORDERED that the trial setting of November 16, 2009, is vacated, and the trial is continued and reset to begin on February 7, 2011, 8:30 AM, Courtroom 6C.

IT IS FURTHER ORDERED that the calendar call in this matter is continued and rescheduled for February 2, 2011, 8:45 AM, Courtroom 6C.

IT IS FURTHER ORDERED that any pretrial motions shall be filed by September 10, 2010. Responses to such motions shall be filed within fourteen (14) days of the service of a motion, and any replies shall be filed within seven (7) days of service of a response.

SO ORDERED this 27th day of October, 2009.

Roger L. Hunt
CHIEF U.S. DISTRICT JUDGE